CURRENT LEGISLATION

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DIVORCE LEGISLATION.—Native genius and idiosyncracy have made the law of divorce in the United States the subject of competitive jurisprudence.[1] From South Carolina, which constitutionally prohibits absolute divorce,[2] and New York, which admits adultery as the only ground,[3] to Washington, which grants a divorce for any ground deemed sufficient by the court,[4] the states find thirty-six statutory causes for divorce,—the whole gamut of moral wrong and legal incapacity.[5] This situation has led to the wholly American institution of the migratory or "carpet-bag" divorce, characterized by an eminent observer as "a grave blot on the administration of justice in the Union."[6] By gaining a statutory domicil, achieved in from six months[7] to three years,[8] a migratory spouse[9] can obtain service of the absent non-resident defendant by publication;[10] and can have the foreign *ex parte* decree of divorce so secured honored, on grounds of comity recognized by most courts,[11] by the very state in defiance of whose laws it was obtained.

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[1]A Constitutional amendment would be needed to give Congress jurisdiction over marriage and divorce, now matters within the plenary reserved powers of the states. Barber *v.* Barber (1858) 62 U. S. 582. This is not deemed a feasible approach to the problem of uniformity. But contrast with the Commonwealth of Australia Constitution Act, 63 & 64 Vic. (1900) c. 12, sec. 51 (xxii), giving the Federal Legislature control over divorce.

[2]Const. 1895, Art. XVII § 3. "In South Carolina to her unfading honor a divorce has not been granted since the Revolution." Head *v.* Head (Ga. 1847) 2 Kelly 191, *per* Nisbet, J.

[3]N. Y. Civ. Code § 1756.

[4]Wash. Rem. 1915 Code § 982.

[5]A tabular analysis is found in Special Report of the Census Bureau on Marriage and Divorce (1909) Pt. I, 268.

[6]James Bryce, Marriage and Divorce, in Studies in History and Jurisprudence (1901) 833, who adds: ". . . in not a few cases the proceedings do little more than set a seal upon that voluntary dissolution by the agreement of the parties which was so common at Rome."

[7]Nev. Rev. Laws 1912 § 5838.

[8]Conn. Gen. St. 1918 § 5286.

[9]In England a wife cannot achieve a domicil separate from that of her husband. Dolphin *v.* Robbins (1859) 7 H. L. C. 390. In this country the wife may acquire a domicil of her own for purposes of divorce. Ditson *v.* Ditson (1856) 4 R. I. 87; Cheever *v.* Wilson (1869) 76 U. S. 108, 123.

[10]These statutes are general, and are said to constitute due process where the foreign court in the divorce action, a proceeding *in rem*, has jurisdiction over the plaintiff and of the *res*, the marriage *status*. 1 Nelson, Divorce (1895) §§ 26-32.

[11]1 Nelson, Divorce § 29.

North Carolina,[12] South Carolina,[13] and New York[14] have refused to credit these divorces unless the foreign court had personal jurisdiction of the defendant;[15] as has Massachusetts where the plaintiff has deliberately gone to a foreign court to evade the *lex fori*.[16] In the famous case of *Haddock* v. *Haddock*[17] the Supreme Court sanctioned the New York view, the startling and tragic results of which are only too apparent.[18]

To satisfy the spiritual need for an interstate divorce law,—as great as the economic need for an interstate commerce law,[19]—a Uniform Act relating to Annulment of Marriage and Divorce was some years ago proposed.[20] In an endeavor to eradicate inconsistencies and check the growing number of divorces throughout the United States,[21] it was proposed to establish uniformity of statutory causes for annulment, separation and divorce; uniform practice in the assumption of jurisdiction; and uniform acceptance of foreign decrees. The grounds admitted for absolute divorce are: adultery, bigamy, conviction of crime followed by two years imprisonment, extreme cruelty endangering life and health, wilful desertion or habitual drunkenness for two years.[22]

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[12]Irby *v.* Wilson (1837) 21 N. C. 568.

[13]McCreery *v.* Davis (1894) 44 S. C. 195, 22 S. E. 178.

[14]Olmstead *v.* Olmstead (1908) 190 N. Y. 458, 83 N. E. 569, affirmed (1912) 216 U. S. 386, 30 Sup. Ct. 292. This position is much modified in Hubbard *v.* Hubbard (Ct. of App. 1920) 62 N. Y. L. J. 2001, where the court recognizes a Massachusetts divorce obtained without personal service, where "no question of public policy or morality is involved."

[15]Even where there had been matrimonial domicil in the foreign state, New York sought to discredit a decree against an absent defendant. Atherton *v.* Atherton (1898) 155 N. Y. 129, 49 N. E. 933. But this the Supreme Court held fell afoul the full faith and credit clause of the Constitution. (1901) 181 U. S. 155, 21 Sup. Ct. 544.

[16]Mass. Rev. Laws 1902 c. 152 § 35; see *infra*, footnote 32. Andrews *v.* Andrews (1903) 176 Mass. 92, 57 N. E. 333, affirmed (1902) 188 U. S. 14, 23 Sup. Ct. 237.

[17](1906) 201 U. S. 562, 26 Sup. Ct. 525: New York, the state of matrimonial domicil, was not bound, under the full faith and credit clause of the Constitution, to honor a decree of Connecticut, valid in that state, where the defendant was not personally served. The distinction from Atherton *v.* Atherton, *supra*, footnote 15, seems insupportably technical.

[18]Discussed: Dicey, 22 Law Quart. Rev. 237; Beale, 19 Harv. Law Rev. 586; Schofield, 1 Illinois Law Rev. 219.

[19]Grant, Law and the Family (1919) 239.

[20]Proceedings, 17th Annual Conference, Commissioners on Uniform State Laws (1907) 120.

[21]The absolute and relative increase in the number of divorces, shown in the Tables in the Special Report of the Census Bureau, *supra*, footnote 5, is accentuated in the latest Report (1919). Grant, Law and the Family, 258. This phenomenon is shown by the Tables to be common in a varying degree to all countries. The extent to which uniformity will lower the number of divorces is questionable. The causes of divorce, moral and sociological, lie deeper. On the influence of legislation on divorce, see Wilcox, The Divorce Problem (1891) 59 *et seq.*, 71.

[22]Uniform Divorce Act § 3.

Judicial separation,—the divorce *a mensa*,[23]—may be had for any of these reasons, and also for hopeless insanity of the husband.[24]

In the matter of procedure, two salutary provisions of the Act call for a decree *nisi* to become absolute at the end of a year at the petition of the plaintiff;[25] and for the insertion in a decree for separation of a clause permitting the parties, in case of a reconciliation, to apply for a revocation of the decree.[26]

It would be an easy solution of the divorce problem to adopt the sacramental view of marriage and permit no divorce at all; we might then be passing laws regulating the portion of his property which a man may leave to his concubine.[27] It is not the only alternative course to permit divorce on any ground or indeed by mutual consent of the parties.[28] A course more consonant with the mores of the times and the needs of society would be to permit divorce where the marriage end has been frustrated whether by moral or criminal offense or incapacity.[29] It is this view which the Act seems to adopt: it reduces the heterogeneous causes for divorce to their lowest common denominator. It would be no radical departure for most states to adopt these sections of the Act.[30]

Manifestly uniformity in the causes for divorce would solve the

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[23]The Act retains the medieval distinction between divorce *a vinculo* and *a mensa*; the judicial separation is pungently criticized in Report of the Royal Commission on Divorce and Matrimonial Causes (1912) 91. Its retention can be justified only on the ground that it affords relief to those, like the Catholics, to whom absolute divorce is forbidden. Twenty-four states at present recognize only the divorce *a vinculo*.

[24]This inclusion, limited though it be, is a step away from the older treatment of divorce as a branch of the criminal law, in recognizing an incapacity apart from guilt as a cause. It is not clear why insanity should not be grounds for absolute divorce. Spencer, Domestic Relations (1911) § 386. It is so recognized in four states at present: Conn. Gen. St. 1918 § 5280; Idaho, Comp. St. 1919 § 7037; Utah, Comp. St. 1917 § 2995; Wash. Rem. 1915 Code § 982.

[25]Uniform Act § 17: meanwhile the court, on its own motion, or on application of any interested party, may, for sufficient cause, order otherwise.

[26]Uniform Act § 18.

[27]Such has been the case in South Carolina, which permits no divorce: Cusack *v.* White (S. C. 1818) 2 Mills 279.

[28]Divorce by mutual consent, in varying degree, was permitted among the Jews: Amram, The Jewish Law of Divorce (1896) 39; among the Romans: Justin., Novel. 40, cited in Kitchin, History of Divorce (1912) 1. At present such divorces are permitted in Belgium, China, Japan, Norway, Portugal, Rumania: Kitchin, at pp. 248, 258; who cites utterances in favor of the doctrine by More, Milton, Selden, Lecky, Montesquieu, Bentham, and Mill. See also Russia, Soviet Decree regarding Divorce, Dec. 18, 1917: 107 The Nation (New York) 825.

[29]Such was the conclusion of the Royal Commission on Divorce and Matrimonial Causes, Report, 100, in urging as grounds for divorce practically those embodied in the Uniform Act.

[30]"There is no substantial difference in the policies of the different states in regard to divorce. The common causes for absolute divorce are adultery, cruelty, desertion, and crime or imprisonment. The states, however, state the causes for divorce in a great variety of terms and add other causes not common to other states". 1 Nelson, Divorce § 11.

problem of the migratory divorce and the difficulties it raises in the conflict of laws. In the absence of such uniformity, the provisions of the Act relating to jurisdiction over absent defendants[31] and to the extra-territorial effect of foreign decrees seem calculated to curb *ex proprio vigore* migratory divorces. In adopting the New York and Massachusetts law in part,[32] the Act prevents the most liberal state from subtly dictating the terms of divorce throughout the country. It may be hard to forbid a deserted wife in New York to take advantage of the liberality of a state just across the Hudson. But it seems better to refuse her this than in effect to permit New Jersey to nullify the laws of New York. The full faith and credit clause was not fashioned to be used as a club by one state to impose its laws upon another. This, indeed, is the thought behind the much-criticized case of *Haddock* v. *Haddock*.

And yet, since its proposal in 1907, the Uniform Act has made little headway. It and similar bills are frequently brought before the legislature,[33] and occasionally pass one of the Houses.[34] Only three states have adopted it.[35] It seems clear that the objection is not to the provisions of the proposed Uniform Act, which embodies as satisfactorily as is possible the general social thought of the day. The opposition comes from two sources. Those who favor more liberal terms of divorce object to uniform legislation because they feel that uniformity means conservatism.[36] And there are those who believe that mores vary sufficiently over the United States so that no one Act can adequately meet opposing local needs. On the other hand, the legislatures are unwilling to penetrate the aura of sanctity and sentimental associations which surrounds the home and family; reminding one of the English Parliament's reluctance to

> " . . . prick that annual blister,
> Marriage with deceased wife's sister."[37]

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[31]Section 10 (b) provides for service by publication: "When, since the cause of action arose the plaintiff has become . . . a *bona fide* resident of this state: *Provided,* The cause of action alleged was recognized in the jurisdiction in which the plaintiff resided . . . as a ground for the same relief asked for in . . . this state."

[32]Section 22 (practically the same as the Massachusetts law cited in footnote 16) requires that full faith and credit be given in the state to a decree duly obtained in another state: *"Provided,* That if any inhabitant of this state shall go into another state . . . in order to obtain a decree of divorce for a cause which occurred while the parties resided in this state, or for a cause which is not ground for divorce under the laws of this state, a decree so obtained shall be of no force or effect in this state."

[33]Thus there is a bill now before the New York Legislature, Ass. Int. No. 98, to admit seven grounds for divorce.

[34]See Proceedings, 19th Annual Conference, Commissioners on Uniform State Laws (1909) 141.

[35]Wisconsin, St. 1917 §§ 2348-76 (Act of 1909, as amended) and Delaware, Rev. St. 1915 §§ 3004-32 (Act of 1907, as amended) have adopted the jurisdictional clauses, with much modification of the causes for divorce; New Jersey, Comp. St. 1910 p. 2021 ff., as amended P. L. 1913 p. 41, P. L. 1916, p. 102, p. 109, p. 110, has practically adopted the Act.

[36]E. de F. Leach, 22 Green Bag 387.

[37]W. S. Gilbert, Iolanthe, 1 Original Plays (1911) 268.

With a realization of these impeding circumstances, the Comissioners have recently divided the Uniform Act into two parts, one dealing with the causes of divorce, the other with procedure and jurisdiction,[38] in the hope that at least the troublesome problems of the conflict of laws may be eliminated if the states are unwilling to change the substantive law. Constant pressure seems the only force that will induce legislatures to act upon these domestic questions, and bring about much-needed and wholesome reform.

JUDICIAL NOTICE OF THE LAW OF FOREIGN STATES.—The general rule that judicial notice cannot be taken of foreign law has a basis in sound reason when the foreign jurisdiction is one of fundamentally different legal tradition. Security and the expedition of the court's business may be served by demanding proof of such laws by documents and witnesses. The states of the Union are foreign to one another. With a logical thoroughness which disregards good sense, the courts of the states generally demand proof of the laws of sister states as fact.[1] Two patent inconsistencies result: this proof, according to the better authority, is directed to the judge, and not to the jury.[2] This is tacit recognition that the determination of the law governing the case, whether *lex fori* or foreign law, is properly within the province of the judge. And further, the judge is always permitted to consult the decisions of other jurisdictions to throw light on the law of his own state; yet he may not use these same cases to say what they declare to be the law of their own state.

A morass of presumptions results, confusing, certain to work substantial injustice in many cases, and fostering the layman's prejudice against the technicalities of the courts. In the absence of proof to the contrary, it is generally presumed that the common law of other states is the same as that of the forum.[3] Some states even presume the law of sister states to be the same as their own statute law,—a most unwarrantable assumption.[4] These presumptions disregard the many points on which the states have variant rules based on differing interpretations of the body of tradition constituting the common law. And there is always the case which has never arisen in the forum; there is then a last presumption to which to resort: that the general common law is in force in the foreign state.[5]

It is difficult to see how a New Jersey judge, writing in the year 1912, can seriously announce that since the New York law of negotiable instruments has not been put in evidence, it must be presumed that the common law is there in vogue; and can offer as a statement of the

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[38]Proceedings, 28th Annual Conference (1918) 48, 101.

[1]17 Columbia Law Rev. 255.

[2]Hooper *v.* Moore (N. C. 1857) 5 Jones Law 130; 4 Wigmore, Evidence § 2558.

[3]1 Greenleaf, Evidence (16th ed.) § 43.

[4]6 Columbia Law Rev. 469.

[5]Merrick *v.* Betts (1913) 214 Mass. 223, 101 N. E. 131; 2 Chamberlayne. Evidence § 1212.